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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LSREF2 APEX3, LLC,

Plaintiff,

v.

MELVA ANN NOMICOS,

Defendant and Appellant;

LAURA DOYLE et al.,

Defendants and Respondents.

G050175

(Super. Ct. No. 30-2013-00631621-CU-EN-CJC)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Franz E. Miller, Judge. Reversed and remanded with directions.

Bennett A. Rheinhold for Defendant and Appellant.

Baker Law Group and John H. Baker; Eugene E. Vollucci, in pro. per., for Defendants and Respondents.

Appellant Melva Ann Nomicos and Respondents Laura Doyle, Shawn Hayes, Lloyd D. Rickard, and Eugene E. Vollucci (collectively Respondents unless the context indicates otherwise), were among the joint and several judgment debtors on a Colorado judgment obtained by a lender after they defaulted on the loan on real property they purchased as an investment. Nomicos owned a 10 percent interest in the property. Before the Colorado court entered its award of costs and contractually authorized attorney fees, LSREF2 APEX3, LLC (LSREF2), the assignee of the judgment creditor, registered the Colorado judgment as a California judgment pursuant to the California Sister State Money Judgments Act (the Act) (Code Civ. Proc., § 1710.10 et seq.).[1] After the Colorado court rendered its costs and attorney fees order, LSREF2 began collection efforts by levying against Nomicos's investment accounts. Nomicos paid the full amount of the judgment plus accrued interest ($840,194.26), and the costs and attorney fees plus accrued interest ($283,124.70), and LSREF2 assigned the judgments to her. Nomicos filed a motion to amend the California judgment to include the amount of the attorney fees and costs award, and she filed a motion pursuant to sections 882 and 883 to compel contribution from her co-judgment debtors. The trial court denied Nomicos's motion to amend the California judgment concluding a sister state judgment could not be amended and, in any event, the judgments were extinguished by being assigned to Nomicos so there was no judgment to amend. The trial court granted Nomicos's motion to compel her co-judgment debtors to contribute towards the judgment amount only—leaving her to bear the full amount of attorney fees and costs. On appeal, Nomicos contends the trial court abused its discretion by denying her motion to amend the California judgment to

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

include the costs and attorney fees award. She also contends the trial court made a mathematical error in computing the contribution amounts of her co-judgment debtors.

We agree the trial court erred by not permitting Nomicos to amend the California judgment to include the costs and attorney fees or to obtain contribution from the co-judgment debtors towards those amounts. We reverse the order and remand to the trial court with directions to amend the California judgment to include the costs and attorney fees paid by Nomicos and recalculate Respondents' contributive share.

FACTS AND PROCEDURE

In 2006, Nomicos and her now deceased husband and a group of investors purchased an apartment building in Colorado (the Property). Nomicos and her husband owned a 10 percent interest in the Property. The investors borrowed approximately $2.5 million from LaSalle Bank National Association (LaSalle), evidenced by a promissory note secured by a deed of trust on the Property. Each of the investors, including Nomicos and her husband, personally guaranteed the loan on a joint and several basis with the guaranty amount not to exceed $1,243,125. The loan documents and the guaranty contained provisions for an award of costs and attorney fees in any litigation arising out of enforcement of the loan and guaranty.

The loan went into default, and in 2011, the Property was sold at a foreclosure sale. Wells Fargo Bank, N.A. (Wells Fargo), as assignee of LaSalle's interest in the guaranty and the loan, commenced an action in Colorado state court against the investors on the guaranty to recover the loan deficiency. Sometime before June 6, 2012, Wells Fargo assigned its interest in the loan to LSREF2.

On October 25, 2012, the Colorado state court entered a judgment for Wells Fargo against 11 defendants representing nine investor sets (the Colorado Judgment). The investors/judgment debtors on the Colorado Judgment and their respective interests in the Property were Nomicos and her husband (10%), Steven D. Wallach (20%), Gordon Lille (5%), Beach Holdings, LLC (whose principal was Jacob J.

Ellens) (10%), John and Mary Dee Kienstra (10%), Doyle (10%), Hayes (10%), Rickard as trustee of a family trust (20%), and Cal State Investment Limited Partnership (whose principal was Vollucci) (5%). The Colorado Judgment ordered the judgment debtors to pay Wells Fargo "jointly and severally, under the [g]uaranty . . . $762,400.95 (which excludes legal fees and costs), plus interest at the per diem rate of $182.93 after August 16, 2012." The court ordered that Wells Fargo "shall have 21 days from the date of this [o]rder to file [its] bill of costs and request for attorneys' fees."

On January 11, 2013, Wells Fargo assigned its interest in the Colorado Judgment to LSREF2. On February 15, 2013, LSREF2 applied to the California court for entry of judgment on the Colorado Judgment against 10 of the judgment debtors including Nomicos and her husband (Wallach was excluded from the application). The application, to which the Colorado Judgment was attached, requested a California judgment be entered in the amount of $794,483.56, comprised of the original judgment amount, accrued interest thereon, and filing fees. On February 21, 2013, the clerk of the court gave notice of entry of judgment in the requested amount ($794,483.56) against the 10 judgment debtors on the Colorado Judgment (hereafter the California Judgment).

On March 4, 2013, back in Colorado state court, Wells Fargo's motion for costs and attorney fees on the Colorado Judgment was heard. On March 4, 2013, the Colorado court issued its order awarding Wells Fargo costs of $12,361. On April 15, 2013, the Colorado court entered its order awarding Wells Fargo $219,162.75 in attorney fees.

LSREF2 then levied a writ of execution for the full judgment amount and costs and attorney fees award on Nomicos's investment accounts. On September 19, 2013, Nomicos paid LSREF2 $1,123,318.96—the full judgment amount with interest and the full costs and attorney fees award with interest—and LSREF2 assigned the Colorado Judgment and the California Judgment to Nomicos. On September 19, 2013, LSREF2 filed a partial satisfaction of judgment by Nomicos in the amount of $840,194.26.

On September 27, 2013, Nomicos filed a motion pursuant to sections 882 and 883, for an order determining the liability for contribution from her co-judgment debtors, including Respondents, for the payments she made on the California Judgment. She sought contribution towards "the principal sum of $756,174.83 plus accrued interest, *or such greater amount as the judgment may be amended to include . . . prejudgment and postjudgment attorney's fees and costs and interest.*" (Italics added.) The $756,174.83 sum represented the amount Nomicos paid on the California Judgment, $840,194.26, less her 10 percent share of liability for the judgment, based on her 10 percent ownership interest in the Property. On September 30, 2013, Nomicos filed a motion to amend the California Judgment to include the costs and attorney fees awarded by the Colorado court on the Colorado Judgment. In her motion to amend she stated that on September 19, 2013, she had also paid the $231,528.75 in costs and attorney fees awarded by the Colorado court on the Colorado Judgment, plus $16,693.43 in accrued interest thereon. Accordingly, she sought to have the California Judgment amended to include those amounts.

The trial court denied Nomicos's motion to amend the California Judgment but granted her motion for contribution. In denying the motion to amend the judgment, the court reasoned it had no authority to amend a sister state judgment to include a subsequent cost award, and because LSREF2 assigned the Colorado Judgment and the California Judgment to Nomicos—a co-judgment debtor—the judgments were extinguished and there was nothing to amend.

In granting Nomicos's motion for contribution, the trial court concluded she was entitled to contribution under sections 882 and 883. It found Nomicos paid LSREF2 $1,123,318.96 comprised of the California Judgment plus accrued interest—$840,194.26—and the costs and attorney fees awarded by the Colorado court and accrued interest—$283,124.70. But Nomicos's motion for contribution sought only contribution towards the California Judgment amount of $840,194.26 and did not include

the additional costs and attorney fees because those amounts had not been added to the California Judgment. Because Wells Fargo had sued the investors on the guaranty, not on the promissory note itself, the trial court concluded Nomicos's share was not limited to her percentage investment in the Property. Rather, because the California Judgment was entered against nine judgment debtors (the court included Nomicos but excluded her deceased husband), she was entitled to contribution from each of the remaining judgment debtors equal to one-ninth of the amount her motion stated was the remaining *principal* of the California Judgment—$756,174.83. The court ordered the judgment debtors Lille, John and Mary Dee Kienstra, Doyle, Hayes, Rickard, and Vollucci, were each liable to Nomicos for one-ninth of $756,174.83 ($84,019 per judgment debtor), plus interest at the legal rate from September 19, 2013.

Nomicos filed a notice of appeal from the order denying her motion to amend and granting her motion for contribution as to Doyle, Hayes, Rickard, and Vollucci only. Rickard has not appeared in this appeal. Doyle and Hayes, jointly represented by counsel, filed a respondents' brief. Vollucci, in propria persona, filed a terse respondents' brief (132 words), stating he agreed with the arguments made by Doyle and Hayes, and which we deemed to be a joinder in their brief.

DISCUSSION

1. Motion to Amend Judgment

Nomicos contends the trial court abused its discretion by denying her motion to amend the California Judgment to include the costs and attorney fees awarded by the Colorado court on the Colorado Judgment, which in turn deprived her of the

ability to obtain contribution under sections 882 and 883 from her co-judgment debtors of the attorney fees and costs she was compelled to pay on their behalf.[2] We agree.

We begin with the question of whether the trial court had jurisdiction to amend the California Judgment to include the subsequent costs and attorney fees awarded on the Colorado Judgment. The Colorado Judgment was entered as a California Judgment pursuant to the Act, "which was enacted to provide: [¶] '[A] simpler and more efficient method of enforcing [sister-state] judgments than the traditional action on the judgment. The registration procedure established by the act is designed to allow parties to avoid the normal trappings of an original action, e.g., the necessity for pleadings. The optional procedure was intended to offer savings in time and money to both courts and judgment creditors, yet, at the same time, remain fair to the judgment debtor by affording him the opportunity to assert any defense that he could assert under the traditional procedure.' [Citations.] In other words, the Act provides a judgment creditor with the right to enforce a sister state monetary judgment as if it were a California judgment against the judgment debtor. Upon simple application in conformance with the Act (§§ 1710.15, 1710.20), entry by the clerk of a judgment based upon the application is mandatory (§ 1710.25), constituting a ministerial act of the clerk and not a judicial act of the court [citations]. 'This statutory scheme manifests a legislative intent that its use or applicability be predicated upon a judgment first obtained and rendered outside of this state. The judgment in this state, following the judgment of a sister state, is ministerial only, that is, an activity by the clerk of this court.' [Citation.] Where the judgment debtor fails to challenge the matter, the judgment will be entered and the application will

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[2] Section 882 provides in relevant part that "[i]f two or more judgment debtors are jointly liable on a money judgment: [¶] (a) A judgment debtor who has satisfied more than his or her due proportion of the judgment, whether voluntarily or through enforcement procedures, may compel contribution from another judgment debtor who has satisfied less than his or her due proportion of the judgment." Section 883 provides that contribution may be compelled on noticed motion in the court that entered the judgment "before the judgment is satisfied in full or within 30 days thereafter."

have served its purpose, all without any judicial act having been performed by the court. [Citations.]" (*Aspen Internat. Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1203 (*Aspen*).)

The trial court had authority to amend the California Judgment to include the costs and attorney fees awarded by the Colorado court. *Aspen*, *supra*, 235 Cal.App.3d 1203 is instructive. In that case a Colorado judgment awarded the judgment creditor principal, interest, costs and attorney fees, plus any "additional costs and attorney's fees incurred in the collection of the judgment." The judgment creditor obtained entry of the Colorado judgment in California under the Act for the original amount awarded by the Colorado court, and later moved to amend the California judgment to include subsequent attorney fees and costs incurred in collecting on the judgment. (*Id.* at p. 1202.) The appellate court held the trial court had jurisdiction to amend the California judgment entered on the Colorado judgment because the amendment was just making the California Judgment conform to the Colorado decree. "[T]he court's amendment was not a new modification or enlargement of the original judgment, but simply an accurate reflection of the scope of relief originally ordered in the Colorado decree." (*Id.* at p. 1205.)

Here, there is no dispute Wells Fargo was entitled to costs as a matter of right as the prevailing party on the Colorado Judgment and that those costs included its attorney fees as authorized by contract. Like the California Code of Civil Procedure, the Colorado Rules of Civil Procedure provide for an award of costs to the prevailing party in litigation and such costs include attorney fees as provided for by contract. (See Code Civ. Proc., §§ 1032, subd. (b), 1033.5, subd. (a)(10)(A); Colorado Rules of Civ. Proc., Rules 54(d); § 13-16-122(h).) The Colorado Judgment plainly contemplated the subsequent award of costs and attorney fees to Wells Fargo as the prevailing party, specifically stating the principal amount of the judgment did not include costs and

attorney fees and ordering Wells Fargo to file its cost bill and attorney fees request within 21 days.

The costs and attorney fees award was simply an incident to the judgment and the trial court had jurisdiction to amend the California Judgment to reflect the subsequent cost award that Nomicos was compelled to pay on her co-judgment debtors' behalf. (See *Wells Fargo & Co. v. City etc. of S.F.* (1944) 25 Cal.2d 37, 44 ["The awarding of costs is but an incident to the judgment [citations], and is therefore within the court's jurisdiction to enter the judgment"]; *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 740-741 [costs normally viewed as incident of judgment]; *Douglas v. Willis* (1994) 27 Cal.App.4th 287, 290 [costs are incident to the judgment].) The inequity of any other conclusion is apparent. Indeed, Respondents' own argument underscores this. They do not dispute their liability on the Colorado Judgment, nor do they dispute Wells Fargo was entitled to an award of its costs and attorney fees incurred in securing that judgment. But they argue Nomicos must now bear their fair share of those costs and attorney fees on her own because: (1) she cannot amend the California Judgment to reflect the cost award; (2) she cannot seek entry of a second California Judgment under the Act to encompass the costs award (§ 1710.55 ["No judgment based on a sister state judgment may be entered pursuant to [the Act if] . . . (c) [a] judgment based on the sister state judgment has previously been entered in any proceeding in this state"]); and (3) she cannot bring a separate action to recover any part of the cost award because there is already a California Judgment entered on the Colorado Judgment (§ 1710.60, subd. (b) ["No action to enforce a sister state judgment may be brought where a judgment based on such sister state judgment has previously been entered pursuant to this chapter]).

We next consider the trial court's alternative reason for denying Nomicos's motion to amend the California Judgment—that assignment of the judgment to her extinguished the judgment leaving nothing to amend. The trial court and Respondents

relied upon *Great Western Bank v. Kong* (2001) 90 Cal.App.4th 28 (*Great Western*). In that case, a partnership defaulted on the loan on an apartment complex it owned, and the bank obtained a deficiency judgment against the partnership and the individual partners. Some of the partners paid the judgment and the judgment creditor assigned the judgment to them. The court of appeal held the assignee partners could not enforce the deficiency judgment as judgment creditors against the non-settling partner. (*Id.* at p. 31.) It reasoned that assignment of a judgment to a co-judgment debtor (as opposed to an innocent third person) extinguished the judgment. "It has long been established in California that the assignment of a joint and several debt to one of the co-obligors extinguishes that debt. [Citations.] The assignment amounts to payment and consequently the evidence of that debt, i.e., the note or judgment, becomes *functus officio* (of no further effect). [Citations.]" (*Id.* at p. 32.) Although the assignee partners in *Great Western* could not enforce the judgment, the court acknowledged they were not without recourse. As a partner, the non-settling partner remained liable for his proportionate share paid toward the partnership debt and the assignee partners could pursue an independent cause of action for equitable contribution under Civil Code section 1432. (*Id.* at p. 33.)

But *Great Western* made no mention of Supreme Court authority, by which we are bound, indicating under the circumstances before us the judgment was not extinguished by its assignment to Nomicos. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) In *Williams v. Riehl* (1899) 127 Cal. 365 (*Williams*), a judgment against defendant and individuals named as sureties on defendant's bond was satisfied by some of the sureties who received a written assignment of the judgment. The Supreme Court held the fact the parties paying the judgment were some of the judgment debtors did not prevent them from taking an assignment of the judgment, and they could enforce contribution by the nonpaying sureties. "The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their

cosureties or the principal. The rule is that, the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect." (*Id.* at p. 370.)

Respondents argue *Williams* has no bearing here because it involved defendants who were liable as sureties—not judgment debtors who were primary obligors

like they and Nomicos are. But our Supreme Court subsequently followed *Williams* in a case involving primary obligors. Similar to the case before us, in *Tucker v. Nicholson* (1938) 12 Cal.2d 427 (*Tucker*), there were several judgment debtors on a mortgage deficiency judgment. Those who paid the judgment obtained an assignment of the judgment from the judgment creditor in the name of their attorney. The assignee judgment debtors had not timely filed a claim for contribution under section 709 (the predecessor statute to sections 882 and 883 under which Nomicos proceeded). But the Supreme Court held that was not their only remedy. "[T]he debtor upon paying the judgment may take an assignment thereof from the judgment creditor. [Citations.] The assignment may be taken in the name of the judgment debtor, or, as in the instant case, in the name of a third party. Whether the judgment debtor proceeds under section 709, or by taking an assignment of the judgment, the payment to the judgment creditor does not operate as a satisfaction of the judgment as between the debtor paying it and those jointly liable with him. [Citations.] *The judgment is kept alive in equity to be used by the debtor paying to recover from his co-obligors the proportions they should pay*, and he may have execution against them. [Citations.]" (*Id.* at p. 430, italics added, citing *Williams, supra,* 127 Cal. at p. 371; see also *Woolley v. Seijo* (1964) 224 Cal.App.2d 615, 622 (*Woolley*) ["judgment debtor may, upon satisfying the judgment, take an assignment thereof in his own name or in the name of a third party. The judgment will then be kept alive in equity to be used by the debtor paying to recover from his coobligors the proportions they should pay, and he may have execution against them"]).

Respondents urge us to disregard *Tucker*, dismissing it as an old case that created a mere "artifice" of the judgment remaining "alive in equity" for purposes of compelling contribution by co-judgment debtors so as to avoid a statute of limitations problem. But we find no reason to disregard the Supreme Court authorities in this regard. Nomicos was compelled to pay the principal judgment amount (and interest thereon) and

the costs and attorney fees subsequently awarded as a matter of right as an incident to the Colorado Judgment, and the judgments were assigned to her. There is nothing indicating Nomicos's payment was intended to extinguish her rights to enforce the judgments against her co-judgment debtors including Respondents. Because the California Judgment continued to have viability so as to compel contribution by the co-judgment debtors, we see no reason that judgment was not capable of being amended to included the costs and attorney fees towards which Respondents should be compelled to contribute.

2. Motion to Compel Contribution

Although the trial court did not permit Nomicos to amend the California Judgment to include the $283,124.70 in costs and attorney fees she paid incident to the Colorado Judgment, it did grant her motion to compel contribution as to the original judgment amount. Nomicos argues the trial court got the math wrong.

The amount of the California Judgment on September 19, 2013, and the amount Nomicos paid, was $840,194.28 (not including the costs and attorney fees). In her motion, Nomicos reduced that amount by 10 percent (her percentage ownership interest in the Property), the amount she agreed she was responsible for, and she sought an order compelling contribution of the remaining co-judgment debtors of the other 90 percent—$756,174.83 (plus additional interest, costs, and attorney fees). The trial court concluded that because the Colorado Judgment was on the guaranty, not the note, and there were nine co-judgment debtors on the California Judgment (the court included Nomicos but excluded her deceased husband), each judgment debtor was responsible for one-ninth of the $756,174.83 that Nomicos sought in contribution towards the judgment amount, i.e., $84,019 plus interest at the legal rate from September 19, 2013. But Nomicos argues the $756,174.83 she sought already took her own proportionate share of the judgment into account—in effect she was charged twice.

Respondents Doyle and Hayes contend the trial court's math should not be disturbed because they should not be required to contribute more than 10 percent of the judgment based on their 10 percent interests in the Property. Based on the total amount Nomicos paid of $840,194.28, their 10 percent share was $84,019, which coincidentally is the same amount the court reached by dividing $756,174.83 by nine total judgment debtors.

Because we remand for recalculation of the contributive shares to include the costs and attorney fees Nomicos paid, we need not decide whether the trial court's math was correct. We note the Law Revision Commission Comments to section 882 observes, "This section does not determine the proportionate shares of the obligation on a judgment; the joint judgment debtor's share depends on the circumstances of the case. [Citations.]" California cases have agreed with basing each co-judgment debtor's proportionate share of a judgment on their ownership interest in the underlying property (See e.g., *Tucker, supra,* 12 Cal.2d at p. 433 ["The liability *inter se* of the comakers of a note given for the purchase price of land is presumptively proportionate to their interest in the land"]; *Woolley, supra,* 224 Cal.App.2d at p. 623 [proportionate share of judgment based on ownership interest].) Indeed, Nomicos conceded as much below. Nomicos claimed her proportionate share of the judgment based on her 10 percent ownership interest in the Property was $84,019, yet she contends each of the other Respondent investors (whether their interest was 5 or 10 percent) are responsible for $94,521 of the original judgment amount. On remand, the trial court should recalculate the contribution amounts based on the parties' proportionate interests in the Property.

DISPOSITION

The order is reversed and the matter is remanded to the trial court with directions to grant Appellant's motion to amend the California Judgment to include amounts paid to satisfy the costs and attorney fees award, and to recalculate Respondents'

proportionate share of the judgment as amended in accordance with the views expressed in this opinion. Appellant is awarded her costs on this appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.